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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 431

AGATHA SCHLEIF,

Petitioner,

vs.

MARGARET B. DEFNET, ANNETTE RYAN, ALMA P. ERASMUS, DR. EDGAR J. CRAITE, DR. STEPHAN E. SEBASTIAN, DR. ALBERT F. YOUNG and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Wisconsin (R. 42-44) is reported in 257 Wis. 170. The opinion of the Circuit Court for Milwaukee County, Wisconsin, (R. 38) is not reported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered June 6, 1950, (R. 41). A motion by petitioner for rehearing was denied on September 6, 1950, (R. 46). The jurisdiction of this court is sought to be invoked on the grounds that a Wisconsin statute, Section 269.25, is repugnant to Article V and Article XIV (1) of the Amendments to the Constitution of the United States, in that the Wisconsin statute allegedly deprives the petitioner of liberty and property without due process of law.

QUESTIONS PRESENTED

1. Whether a federal question presented initially to the highest state court on petition for rehearing can be considered by this Court where the state court did not entertain or decide the question and where the state court did not give the state statute, under consideration, a new construction in its decision.

2. Whether a State in order to prevent delay and congestion in its judicial system may, by statute, empower courts to without notice, dismiss any action or proceeding which is not brought to trial within five years after its commencement.

STATE STATUTE INVOLVED

Section 269.25 of the Wisconsin Statutes provides as follows:

> "The court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement."

STATEMENT

The material facts may be stated briefly as follows:

1. On August 17, 1938, the petitioner commenced an action for malicious prosecution against the respondents herein by service of a summons. (R. 1).

2. A complaint was subsequently drawn by Attorney Alfred J. Sapiro of Milwaukee for petitioner, and served on the respondents in December, 1938. (R. 8).

3. Answers and demurrers of the various respondents were served and filed in December, 1938 and January, 1939. (R. 13-15).

4. Being dissatisfied with the services rendered by her counsel, the petitioner shortly before August 19, 1940, conferred with Attorney Harold J. Sanville of Milwaukee. He advised petitioner that her case had not been noticed for trial (in accordance with the applicable statute) and that there was a five year statute of limitations fixing the time within which the action must be brought to trial or be dismissed and suggested she get other counsel. He further advised her to write the Clerk of Court so as to be informed by him of any development in respect to her case, pending such time as she was deliberating on a choice of a new attorney. (R. 30, 35).

5. On August 19, 1940, on the request of the petitioner, Attorney Sapiro signed a consent of withdrawal as the attorney of record for the petitioner, which consent was filed in the Circuit Court of Milwaukee County, but was not served upon counsel for respondents, nor were they notified of such withdrawal. (R. 16, 32).

6. On October 16, 1943, petitioner wrote the Clerk of the Circuit Court for Milwaukee County advising him of her place of address while she sought new attorneys to take care of the case in court. (R. 16).

7. On December 23, 1943, petitioner's action was ordered and adjudged dismissed by the Circuit Court for Milwaukee County for want of prosecution. The attorneys for respondents, Dr. Albert F. Young and Fidelity and Casualty Company of New York, had brought a motion for dismissal and served notice of motion for dismissal on Attorney Sapiro on November 24, 1943. The motion was argued before the court on December 3, 1943, with no appearance by or on behalf of the petitioner. (R. 17, 18).

8. From August 19, 1940, until January, 1949, petitioner did not employ an attorney to represent her in this action, nor inform the court of her lack of representation. (R. 19, 27, 28, 37).

9. Petitioner claims that during January, 1949, she made the first inquiry so as to discover that her action had been dismissed for want of prosecution on December 23, 1943. (R. 28).

10. On July 1, 1949, a motion to reinstate said action was brought to hearing before the Circuit Court for Milwaukee County, in which affidavits and arguments were presented and testimony of the petitioner and Attorney Sanville taken, dealing with the alleged grounds for relief. Thereupon, the court dismissed said motion, with formal order being entered. (R. 38, 39).

11. Petitioner appealed to the Supreme Court of Wisconsin from the dismissal of her reinstatement motion by the Circuit Court for Milwaukee County contending that she was not properly notified of the earlier motion for dismissal in 1943 and that she should not be penalized for failure of her former attorney to notify her of the existence of that motion for dismissal. No contention was made in the briefs or oral argument of counsel for peti-

tioner that Section 269.25 W. S. was invalid, or unconstitutional. On June 6, 1950, the Supreme Court of Wisconsin affirmed the order of the Circuit Court for Milwaukee County denying reinstatement and held that the lower court did not abuse its discretion in refusing to reinstate petitioner's action. (R. 41-44).

12. Petitioner moved the Supreme Court of Wisconsin for a rehearing of its decision then contending, for the first time, that Section 269.25 W. S. conflicted with Article V and Article XIV of the amendments to the Constitution of the United States. On September 6, 1950, the court denied petitioner's motion without opinion. (R. 46).

ARGUMENT

I.

THE PRINCIPAL QUESTIONS PRESENTED BY THE PETITION HAVE BEEN RAISED TOO LATE FOR CONSIDERATION BY THIS COURT

The petitioner attempts to invoke the jurisdiction of this Court to review the determination of the state court on the ground that Section 269.25 of the Wisconsin Statutes is repugnant to Article V and Article XIV (1) of the Amendments to the Constitution of the United States. It is submitted that this question is presented too late to be heard by his Court because it was belatedly presented to the Supreme Court of Wisconsin on petition for rehearing and that court did not entertain or decide such question, but denied such petition without opinion. Moreover, the Supreme Court of Wisconsin did not give Section 269.25 a new or unanticipated construction in its decision. By a long established general rule, the matter cannot serve as a

basis for review by this Court. *American Surety Co. v. Baldwin,* 287 U. S. 156; *Herndon v. Georgia,* 295 U. S. 441.

Petitioner would have this Court believe that the Supreme Court of Wisconsin based its decision in the case on the validity of Section 269.25. Such is not the fact. It must be remembered that the narrow issue before the Supreme Court of Wisconsin on petitioner's appeal was whether the Circuit Court for Milwaukee County abused its discretion in refusing to reinstate petitioner's action in 1949. (R. 43).

The Supreme Court of Wisconsin pointed out in its opinion that petitioner had commenced her action in 1938; that in 1940 she was informed by Attorney Sanville that her case had not been noticed for trial and would be subject to dismissal if not brought to trial within five years from date of commencement; that when petitioner's action was dismissed in 1943, it already had been pending more than five years; that in 1949 when petitioner made her motion to reinstate, she could be in no better position than if no dismissal had been entered; finally, that if she had a cause of action worth trying, she should have brought it on for trial sometime within the eleven year period. The Supreme Court of Wisconsin then correctly held that the Circuit Court did not abuse its discretion in refusing to reinstate the action. (R. 44).

The decisions of the Supreme Court of Wisconsin and the Circuit Court for Milwaukee County clearly show that they were based upon the fact that petitioner was guilty of laches without excuse or justification. There is no evidence that those decisions were based upon the provisions of the statute whose constitutionality is now assailed.

It should be noted that petitioner did not argue before either of those courts that Section 269.25 was invalid for any reason whatsoever. Her contentions there were that she had not been properly notified of the 1943 motion for dismissal of her action; that her action should not have been dismissed where she intended to rely upon advice of counsel; that she should not be penalized for error committed by her former attorney. Since the record in this case does not show that petitioner presented for decision to the Supreme Court of Wisconsin any federal question, or that that court ruled on the validity of a Wisconsin Statute under the laws and Constitution of the United States, petitioner has no standing before this Court. ***Wilson v. Cook,*** 327 U. S. 474, and cases cited.

Furthermore, service of defendants' notice of motion to dismiss petitioner's action in 1943 was made upon petitioner's attorney, Sapiro, who, so far as the attorneys for the defendants were then aware was, with no contrary information, still petitioner's attorney. It is conceded by petitioner, that defendants' attorneys had not been informed that Attorney Sapiro had ceased to represent the petitioner. The service upon the attorney under the circumstances constituted valid notice to petitioner. ***Boyd v. Stone,*** 5 Wis. 240; Sec. 269.37, Wis. Stats.; Sec. 256.27, Wis. Stats.; ***Waterhouse v. Freeman,*** 13 Wis. 339; ***Canning v. Hackett,*** 3 F. Supp. 460.

Accordingly, petitioner was not affected by the provision of the statute which she now charges to be unconstitutional.

II.

PETITIONER'S OWN LACHES, NOT ANY FAILURE ON THE PART OF HER FORMER ATTORNEY, RESULTED IN DENIAL OF REINSTATEMENT OF HER ACTION

Petitioner further contends that failure on the part of her former attorney, Sapiro, to notify her that he admitted service on defendants' motion for dismissal in 1943 deprived her of property without due process of law. The Supreme Court of Wisconsin said in its opinion on such point:

> "Plaintiff contends that she was misled to her prejudice because she relied upon her attorney, Mr. Sapiro. He had been her attorney for only two years, 1938-1940. Surely she cannot be heard to say that she was relying upon him to do anything in her behalf after she had caused him to withdraw from the case. Furthermore, in 1940, Mr. Sanville had advised her of the need to avoid delay." (R. 43).

Furthermore, petitioner's argument collapses when it becomes apparent that it was her own inexcusable neglect and delay which led to her position of which she now complains. Petitioner commenced her action in August, 1938. Even if her action had not been dismissed in 1943, the fact remains that she waited until the middle of 1949 to ask the court to reinstate her action to entitle it to have a status for trial. From October, 1940 to January, 1949, she delayed procuring counsel to care for her interests in the litigation.

The Supreme Court of Wisconsin, in its opinion, pointed to petitioner's disregard of her responsibility to complete the litigation she had commenced and said: "If she had a cause of action worth trying, she should have

brought it on for trial within eleven years. The court was entitled to consider the additional delay upon her part when determining the motion for reinstatement. She gave no real reason for the delay from 1940 until 1949." (R. 44).

Petitioner further attempts to excuse her delay by designating herself as a war worker. The termination of the war during August, 1945 is well known, yet petitioner made no motion to reinstate her action until July 1, 1949.

Petitioner's own testimony shows her complete lack of diligence in prosecuting her claim. She stated:

> "I was a war worker and was very busy and did not have sufficient time at all hours of the day to spend on choosing counsel. I did shop around for one but I did not feel I had found one I would trust this case in his hands, and of course until I did find a counsel that I thought would be the man to handle it, I notified the Clerk of the Circuit Court; * * *" (R. 37).

Surely the petitioner cannot blame her former attorney for her own laches.

III.

SECTION 269.25 OF THE WISCONSIN STATUTES DOES NOT DEPRIVE A PLAINTIFF OF PROPERTY WITHOUT DUE PROCESS OF LAW

The court in *Wills v. Shepard,* 184 Wis. 26, 198 N.W. 618, said (p. 29):

> "Just as public policy declares that there shall be a limitation as to the time within which actions may be brought, so is it the policy of the law that when an action is brought it shall be prosecuted with some

reasonable degree of expedition. Sec. 2811a,[1] Stats., authorizes the dismissal of an action when it has not been brought to trial within five years after its institution. While this is not a mandatory statute, and it does not fix a hard-and-fast rule, it does rather significantly indicate public policy upon that question. Five years is a generous time within which to permit a plaintiff to bring an action to trial. * * *"

In *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 390, this Court, in regard to statutes of limitations, used language applicable to this case:

"* * * They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. * * *"

Surely, a plaintiff who has had five years or more in which to bring her action on for trial cannot with justice claim she has been denied fundamental rights by the provisions of Section 269.25 which allow dismissal of her action without notice. The statute clearly puts a plaintiff on notice that she must proceed to trial within a five year period or be denied the attention of the court for her lack of diligence. The facts of the instant case show that the

[1]Section 269.25 before it was renumbered.

petitioner was aware of Section 269.25 three years before her action was dismissed.

The statute is directory and not mandatory. *Wis. Lumber & Supply Co. v. Dahl,* 214 Wis. 137, 252 N.W. 714. Nor is it an absolute bar to a plaintiff's right to bring her action on for trial. Where the trial court has clearly abused its discretion and arbitrarily dismissed the action, plaintiff is entitled to have the action reinstated. If such reinstatement is denied, plaintiff still may seek redress in the Supreme Court of Wisconsin. If plaintiff can show that she is justly entitled to be relieved from the order of dismissal, that court has power to so direct. *Hine v. Grant,* 119 Wis. 332, 96 N.W. 796. The court there said (p. 336):

> "* * * The statute referred to (Sec. 2811a) was passed to punish the suitor who sleeps away his day in court, and give trial courts a certain and speedy means of clearing the records of mere deadwood, not to turn out of court a suitor who, though ready to proceed seasonably, has consented to delay in order to accommodate opposing counsel, as was shown to be the case here. This proposition seems too plain for extended discussion. The complaint was duly verified, and stated a cause of action. No further showing of merits was necessary. The court abused its discretion in not vacating its order of dismissal."

The Supreme Court of Wisconsin has said that trial courts have inherent powers independent of statute to refuse to aid those who negligently fail to prosecute the actions which they commence. *Smith v. Carter,* 141 Wis. 181, 122 N.W. 1035. In view of such powers vested in trial courts, the provisions of Section 269.25 cannot be considered unreasonable.

The right of appeal from a determination made without prior notice, itself affords the complaining party due

process of law. *American Surety Co. v. Baldwin*, 287 U. S. 156. The review by the Supreme Court of Wisconsin met the requirements of due process.

CONCLUSION

There are no unique and cogent reasons for the review of this case by this Court. The facts show clearly that petitioner was guilty of laches without excuse or justification in the prosecution of her claim. Nothing will be gained in the way of precedent by a review of this case.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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